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No. 84-1349

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

JERRY T. BUSTO
Petitioner,

vs.

MARTIN MARIETTA CORPORATION
A MARYLAND CORPORATION
Respondent.

On Writ of Certiorari from the Colorado
Court of Appeals

REPLY TO BRIEF IN OPPOSITION

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STATUTES INVOLVED IN THE CASE

1. Rule 97 of the Colorado Rules of Civil Procedure

RULE 97. CHANGE OF JUDGE

A judge shall be disqualified in an action in which he is interested or prejudiced, or has been of counsel for any party, or is or has been a material witness, or is so related or connected with any party or his attorney as to render it improper for him to sit on the trial, appeal, or other proceeding therein. A judge may disqualify himself on his own motion for any of said reasons, or any party may move for such disqualification and a motion by a party for disqualification shall be supported by affidavit. Upon the filing by a party of such a motion all other proceedings in the case shall be suspended until a ruling is made thereon. Upon disqualifying himself, a judge shall

notify forthwith the chief judge of the district who shall assign another judge in the district to hear the action. If no other judge in the district is available or qualified, the chief judge shall notify forthwith the court administrator who shall obtain from the Chief Justice the assignment of a replacement judge.

RULE 38. Sanctions

(d) *Sanctions for Frivolous Appeal.* If the appellate court shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

REPLY TO ARGUMENT

Counsel for Respondent, in his Brief in Opposition, argues that Petitioner, Jerry T. Busto ("Busto") falsely asserts in his statement of the case that the record is void of any ruling on Petitioner's motion for a change of judge. To support his argument Counsel for the Respondent refers to (Appendix to Petition, p-17) and (Appendix A of Brief in Opposition). Both of these references are portions of the trial transcript in which Judge Lilly, who presided at the trial states, "you have assignment to a different judge as you requested." and "Judge Perricone disqualified himself." These two statements by Judge Lilly cannot be construed to comprise a proper ruling on the motion for a change of judge. It remains a mystery as to *how* and by *whom* Judge Lilly was appointed as successor judge.

Rule 97 provides that any party may move for disqualification and that upon the filing by a party of such a motion all other proceedings in the case shall be suspended until a ruling is made thereon. Upon disqualifying himself a judge shall notify forthwith the *chief judge of the district who shall assign another judge.* Two statements made at the trial by a judge whose jurisdiction is in question cannot be construed as a ruling. The record remains void of a proper ruling on the motion.

Counsel for Respondent argues that although Busto raised an issue concerning his motion for a change of judge, he questioned the requirements of Rule 97 of the Colorado Rules of Civil Procedure and not procedural due process requirements. The requirements of a Rule of Civil Procedure and procedural due process requirements cannot be separated. *Lucas v. District Ct.*, 140 Colo. 510, 345 P.2d 1064 (1959) "The Colorado Rules of Civil Procedure are patterned after the Federal Rules." *In re City of Coral Gables, Fla.*, 1 F.R.D. 600 (1941) "The new Federal Rules contemplate an orderly administration of justice, and recognize all the provisions of the Constitution in regard to due process. The Supreme Court has held: "Due process expresses requirements of fundamental fairness. . . . . In its Fourteenth Amendment, our Constitution imposes on the states the standards necessary to insure that judicial proceedings are fundamentally fair." *Lassiter v. Dept. of Soc. Serv. of Durham City*, 452 U.S. 18, 25, 34; 101 S. Ct. 2153, 2158, 2163; 68 L.Ed. 2d 640 (1981).

"Due process of law (it is said) undoubtedly means in the due course of legal proceedings according to those *rules* and forms which have been established for the protection of private rights," *Westervelt v. Gregg*, 12 N.Y., 209.

The words "due process of law," when applied to judicial proceedings, "mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." *Pennoyer v. Neff*, 95 U.S. 714, 733, 24 L. Ed. 565; *Scott v. McNeal*, 154 U.S. 34, 46, 14 S. Ct. 1108, 38 L. Ed. 896.

If time were available, Petitioner would amend his Questions Presented for Review in the Petition for Writ of Certiorari to include whether Petitioner's constitutional right to due process was violated when Jefferson County District Court of Colorado violated Rule 97 (CRCP) by not following its mandate to halt the proceedings until a ruling was made on the motion for a change of judge. As the record remains void of a legal and proper ruling on said motion it must be assumed in

all fairness that no ruling was ever made. To hold a trial in light of these facts was to grossly abuse justice and deny Petitioner his most fundamental constitutional rights. Had Rule 97 been followed according to mandate Petitioner would have had the time desperately needed to obtain counsel and he would not have been forced to fight alone for his rights against a multi-million dollar corporation.

On or about June 11, 1982 Petitioner went alone without counsel to the pre-trial hearing. At the hearing he explained his situation to Judge Perricone of Jefferson County District Court. His attorney, Jack Taussig, had been allowed to withdraw at an emergency hearing without giving prior notice, Petitioner was given no advice as to his rights concerning this withdrawal and no inquiry into why Jack Taussig withdrew was held. Since his attorney had been allowed to withdraw, Petitioner had tried to hire seven different attorneys to represent him. Petitioner presented Judge Perricone with letters of refusal from five of these attorneys and explained that the other two, Elizabeth Meyer and Jim Kissel had led Petitioner to believe up to the night before the pre-trial hearing that they would represent him. Elizabeth Meyer had possession of Petitioner's file and had answered Petitioner's interrogatories with him. The night before the pre-trial hearing, Elizabeth Meyer had informed Petitioner that neither she nor Jim Kissel would represent him. Petitioner then made a motion for continuance based on the above facts. Judge Perricone denied the motion.

Petitioner made a motion for a change of judge. (See Appendix D of Writ). In this motion Petitioner again stated the facts of why and how he was without counsel through no fault of his own. Judge Perricone knew that if he properly followed the mandate of Rule 97 (CRCP) concerning the change of judge, the proceedings would come to a halt, the trial would be postponed, and Petitioner would have time to obtain counsel to represent him. Because Rule 97 was never properly followed, Petitioner was deprived of his property (co-owner rights to a

multi-million dollar invention) without due process of law as guaranteed by the Fifth and the Fourteenth Amendments to the United States Constitution.

At the trial on July 6, 1982 after learning to his complete surprise that his case was being heard by Judge Lilly due to the fact that Judge Perricone had a "heavy case load," Petitioner presented his prepared motion for continuance (See Appendix A) to Judge Lilly. This motion also stated why and how Petitioner was without counsel. Judge Lilly denied the motion and the trial was conducted anyway. Throughout this case Respondent has painted a picture of Petitioner as a man who didn't try very hard to obtain counsel, when the exact opposite is true.

Counsel for Respondent falsely asserts that the case involved trade secrets and not a patent. **On December 11, 1980 Counsel for Martin filed an action against Busto in Jefferson County District Court to enjoin Busto from disclosing information about the subject technology of the invention in question. Contained in this court filing was a description of the subject technology. Colorado law makes court filings available to the public for inspection. On July 23, 1981 Busto discovered the description of the subject technology in the court filing. He filed a motion with the Jefferson County District Court to have the file suppressed to protect the *trade secret* value of the invention. (See Appendix B)**

Judge Perricone denied Busto's motion saying that "to suppress a file is a sure way to get the press involved." On July 30, 1981 after being advised by Busto of the situation, Martin joined Busto in a motion to the court to suppress those portions of the file which contained the subject technology. (See Appendix C) Judge Perricone then proceeded to grant the motion when before he had denied Busto. Martin assured the court after having its legal staff go through the file that all portions containing the subject technology had been isolated for suppression.

In November of 1981 Busto again discovered that the file still contained the subject technology in the original court filing by Martin dated December 11, 1980. U.S. patent law states that after public disclosure one year's time exists in which to apply for a patent. Martin called for an emergency hearing for the purpose of temporarily lifting the injunction so that a patent could be applied for. On December 11, 1981 Martin applied for a patent. By their own actions in entering a document containing a description of the subject technology in the court file which was open to public inspection, Martin destroyed the *trade secret* status of the invention a whole year and a half before the trial.

Counsel for the Respondent argues that a determination by a state court that an appeal is frivolous, thus entitling the prevailing party to recover double attorneys' fees pursuant to the state's procedural rules does not present a federal question. Counsel for Respondent further argues that Busto presents a constitutional issue only if the Colorado Court of Appeals utilized an impermissably vague standard. The Colorado Court of Appeals denied the Petitioner due process of law in holding him accountable for a standard that was vague. The Colorado Supreme Court has held that the standard of determining frivolousness prior to *International Technical Instruments, Inc. v. Engineering Measurements Company*, 12 Colo. Law 1983 (Colo. App. 1983), were vague. Petitioner's Appeal and corresponding briefs were filed prior to *International*, therefore, Petitioner was not adequately apprised of what constituted a frivolous appeal and cannot subsequently be penalized for committing a wrong that did not exist at the time. If the standards were vague, the Petitioner cannot be held accountable for not complying with or violating them. To do so denies Petitioner due process of law.

Counsel for Respondent states that Counsel for both Martin and Busto presented arguments before the Colorado Court of Appeals on Martin's Motion for sanctions in which it requested recovery of its attorneys' fees and costs. Counsel for

Busto did in fact use the one minute allowed for oral argument on this motion. When Counsel for Martin stood to present his one minute of oral rgument he was told by the Court to sit down because his argument was not necessary. This certainly gives the appearance of prejudice by the court. It seems obvious that the court had already decided the issue without bothering to hear all the facts. The court did in fact award attorneys' fees and double costs to Martin.

In Martin's Motion For Sanctions (See Appendix "D" of the Brief in Opposition) it is stated that the Appeal was at issue and had been set for argument. It does not clearly state that one minute of oral argument will be set aside for argument on sanctions exclusively. Counsel for Petitioner was told to use the time allowed him for oral argument to present his strongest arguments. The wording of the motion is misleading. As a result of this Counsel for Petitioner was taken by surprise when the court announced the one minute's time for oral argument on sanctions. He did however do his best and as stated above the court felt it unnecessary to even hear Counsel for Respondent's oral argument, having made their decision already.

Even were the Petitioner's Appeal to be frivolous, which Petitioner denies, the Colorado Court of Appeals award of damages in the nature of reasonable attorneys' fees is *directly contra* to the Colorado Supreme Court's holding in *Re the Marriage of Mann*, 655 P.2d 814 (Colo. 1982) and Division III of the Court of Appeals holding in *Re the Marriage of Trask*, 580 P.2d (Colo. App. 1978).

In *Mann* the Colorado Supreme Court after maintaining the appeal as frivolous refused to award the appellee attorneys' fees because she failed to specify an amount of damages in her motion. The rule 38(d) motion filed by Martin herein likewise failed to state any amount of damages. The Colorado Supreme Court's decision in *Mann* is in conformity with the Court of Appeal's decision in *Trask*, when the Court of Appeals granted attorneys' fees pursuant to C.A.R. 38 because a specific amount was requested and supported by an accompanying affidavit.

Counsel for Respondent argues that Busto's objection to the assigned judge was rendered moot by the fact that a different judge heard the case. Rule 97 of the Colorado Rules of Civil Procedure states that a judge should not appoint his own successor. *Aaberg v. District Court*, 136 Colo. 525, 319 P.2d 491 (1957) "When a judge is charged with bias and prejudice and sustains a motion so charging, or steps aside without ruling on the motion, proper procedure requires that he not select his successor or assign the case to another judge but that he proceed in accordance with this rule. The Court of Appeals of Colorado should not have assumed as fact something which does not appear of record and base its ruling thereon (no prejudice no error). See *Smith v. Davis*, 45 S.E. 2d 236, 240 (GA. App. 1947); 5 C.J.S. *Appeal and Error* § 1584 P. 1051. It has been held that failure to comply with the provisions of a mandatory legal directive constitutes error per se and must be deemed prejudicial, *Ferderer v. Northern Pacific Ry. Co.*, 26 N.W. 2d 236, 241 (N.D. 1947). Since there is nothing in the record to indicate that Judge Perricone disqualified himself properly or that Judge Lilly was chosen in the proper manner according to the mandate of Rule 97, Counsel for the Respondent's argument that Busto's objection to the assigned judge was rendered moot is *false*.

If the Petition on Writ of Certiorari from the Colorado Court of Appeals is granted, Petitioner will have an attorney who is a certified member of the bar of the United States Supreme Court represent him at oral argument.

CONCLUSION

A review on writ of certiorari is not a matter of right, but of judicial discretion. The case should be one of imperative public importance. What can be of more importance to the public than to preserve the right of each human being to a fair trial? To conduct a trial in which one man through no fault of his own is forced to fight alone for his rights as a human being against a multi-million dollar corporation is a gross abuse of justice. Petitioner has been forced to file his petition for writ of certiorari pro-se. He should not be penalized for this while Respondent with unlimited funds and the best counsel money can buy is allowed to ignore the Rules of Civil Procedure and make up its own rules to suit its own purposes. Federal due process requires that a person may not be deprived of life, liberty, or property without due process of law. By allowing Jefferson County District Court of Colorado and the Colorado Court of Appeals to ignore the rules of civil procedure as stated by Rule 97 of the Colorado Rules of Civil Procedure, Petitioner is denied his constitutional right to due process of law as guaranteed by the Fifth and the Fourteenth Amendments to the United States Constitution.

Petitioner respectfully requests that this honorable court use its power of judicial discretion to grant his petition for writ of certiorari and by doing so uphold the right of each person to a fair trial. Without a fair trial wrong is sure to triumph over right.

Respectfully submitted,

JERRY T. BUSTO, PETITIONER PRO-SE
790 Depew Street
Lakewood, Colorado 80214
(303) 237-1062 or 237-9373

APPENDIX "A"

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF JEFFERSON
STATE OF COLORADO

Civil Action No. 80-CV-3763

MARTIN MARIETTA CORPORATION	)	
Plaintiff,	)	
	)	DEFENDANT'S
vs.	)	MOTION FOR A
	)	CONTINUANCE
JERRY T. BUSTO	)	
Defendant.	)	

COMES NOW the Defendant, Pro-se, Jerry T. Busto, and respectfully requests that this Court grant his MOTION FOR A CONTINUANCE. As grounds in support of his motion, the defendant states the following:

The Defendant is without legal representation due to the fact that the Court allowed his attorney of record to withdraw without a hearing or an inquiry into the reasons for the withdrawl *(sic)*, and without advising Defendant of his rights concerning this withdrawl *(sic)*.

Defendant has tried in vain to retain the following council *(sic)* to represent him in this matter; Jerry Spence, Joseph Branney, Paul Baca, Leo Gemma, Scott Robinson, Elizabeth Meyer, and Jim Kissel.

Each of these attorneys has declined because of the insufficiency of time in which to prepare for such a complex case, or because of prior commitments. Elizabeth Meyer and Jim Kissel lead Defendant to believe that they were going to represent him, and informed him the day before the pretrial hearing that they could not. Defendant is not an attorney, and is unable to prepare for this trial without council *(sic)*. Defendant needs a

continuence *(sic)* in order that he may obtain proper council *(sic)* to represent him.

Due to the foregoing, Defendant respectfully requests that this Honorable Court grant his MOTION FOR A CONTINUENCE *(sic)*.

Respectfully submitted,

Jerry T. Busto, Defendant, pro-se
790 Depew Street
Lakewood, Colorado 80214
237-1062

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of DEFENDANT'S MOTION FOR A CONTINUENCE *(sic)* was deposited in the United States Mail, postage prepaid, addressed to the following; on this 6th day of July 1982.

John R. Webb
1700 Broadway
Denver, Colorado 80290

Marla J. Busto

APPENDIX "B"

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF JEFFERSON
STATE OF COLORADO

Civil Action No. 80-CV-3763, Div. 2

MARTIN MARIETTA CORPORATION	)	
Plaintiff,	)	
	)	MOTION
vs.	)	TO
	)	SUPPRESS
JERRY T. BUSTO,	)	
Defendant.	)	

COMES NOW THE DEFENDANT, JERRY T. BUSTO, and moves this court for the suppression of Action No. 80-CV-3763-Div. 2. I respectfully make this motion to prevent the technology that represents the subject matter of this action from falling into the hands of anyone who may request to see this file. The specifics of the invention in question are contained on page 2, paragraph 2 of the REPLY BREIF *(sic)* IN SUPPORT OF MOTION TO MODIFY PRELIMINARY INJUNCTION., filed on June 22, 1981. This same technology representing subjuct *(sic)* matter of this action is contained in IDEA REPORT (B), filed June 5, 1981.

Respectfully submitted,

Jerry T. Busto 07-23-81
790 Depew Street
Lakewood, Colorado

APPENDIX "C"

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July 30, 1981

Judge Gaspar F. Perricone
District Court
Hall of Justice
1701 Arapahoe
Golden, CO 80419

Re: **Martin Marietta Corporation v. Busto**

Dear Judge Perricone:

With respect to the concern expressed in chambers on July 28 concerning potential destruction of the value of the subject technology through information contained in the Court file, Martin Marietta's position is as follows:

1. Martin Marietta joins in Mr. Busto's motion that the entire file be suppressed.

2. To the extent that the Court declines to suppress the entire file, but will suppress certain particular filings, Martin Marietta has examined the file, and requests that two documents, together with attachments thereto, be suppressed:

(a) Defendant's Consolidated Brief on Pending Motions, filed on or about June 3, 1981; and

(b) Reply Brief in Support of Motion to Modify Preliminary Injunction, filed on or about June 22, 1981.

Martin Marietta would prefer to present this matter by way of a stipulation. However, a certain amount of confusion continues to surround the status of Mr. Busto's representation. For this reason, and in the interest of time, with the hope that a stipulation may later be reached, Martin Marietta respectfully requests that the Court remove the above-described documents, and hold them separately in a secure place, subject to the Court's review in connection with the September 9 hearing.

Respectfully,

John R. Webb

JRW:my

cc: John G. Taussig, Jr., Esq.
Jerry T. Busto